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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
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Apr 19 12 02 PM '00

COMMONWEALTH EDISON COMPANY)
)
Petition for expedited approval of implementation)
of a market-based alternative tariff, to become)
effective on or before May 1, 2000, pursuant to)
Article IX and Section 16-112 of the Public)
Utilities Act)

CHIEF CLERK'S OFFICE

Docket No. 00-0259

COMMENTS OF THE PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois ("AG" or "the People") hereby file their comments on the petition filed by Commonwealth Edison ("ComEd") requesting expedited approval of a market-based alternative tariff pursuant to Article IX and Section 16-112 of the Public Utilities Act.

I. INTRODUCTION

The Attorney General's Office, on behalf of the People of the State of Illinois, wholly supports any steps taken toward the development of a viable, fully competitive electric power and energy market. We have actively participated in many formal and informal proceedings before the Illinois Commerce Commission in which the parameters and design of the newly competitive electricity market are being shaped. We welcome any proposals, from any party, that could lead to the provisioning of electric power and energy in a truly competitive market and are committed to seeing that market become a reality.

In that spirit, we are submitting the comments which the Hearing Examiner solicited in his "Scheduling Ruling," issued on April 13, 2000. ComEd proposes that market-based alternative tariffs, which could eventually impact not only its large business customers, but also residential customers throughout the state, be reviewed and implemented in manner that may not

afford interested parties an opportunity to exercise their due process rights. In granting ComEd's request for an expedited proceeding, the Hearing Examiner's ruling directs that ComEd's petition is to be considered on a schedule so accelerated that it cannot be said to amount to a "hearing" in any sense of the word.

We appreciate the Commission's earnest desire to bring the benefits of competition to as many Illinois consumers as soon as possible. We do not believe, however, that those same consumers will be well-served by a proceeding that, of necessity, will leave too many questions unanswered. As we explain below, a formal evidentiary hearing is clearly in order in view of the fact that the petition prompted the opposition of a number of parties on substantive grounds and at least a half dozen questions from the Chairman on a variety of topics that clearly were not sufficiently explored in the petition or in its supporting testimony.

ComEd's petition seeks a Commission ruling that its proposed tariffs be found "just and reasonable." Such a determination requires evidence, cross-examination and an order containing legally supported findings. This is not possible under the Hearing Examiner's Scheduling Ruling for the reasons set forth below.

II COMMENTS

A. The schedule proposed to consider Commonwealth Edison Company's petition violates the Public Utilities Act.

ComEd's petition was filed pursuant to Section 16-112(a) of the Public Utilities Act, 220 ILCS 5/101 et seq. ("the Act" or "PUA") as well as Article IX of the Act. Section 9-101 requires that all rates and charges for any commodity or service pursuant to the Act shall be just and reasonable and that all rules and regulations pertaining to its charges to the public also be just and reasonable. 220 ILCS 5/9-101. Further, Section 9-201 provides that a public utility may not change any rate, charge or practice which effects any rate or charge, except after 45 days' notice

to the Commission and to the public. 220 ILCS 5/9-201. The Commission may waive this 45-day filing requirement only upon showing of good cause, by an order specifying the changes to be made, the time when they will take effect and how the changes will be filed and published. Id.

In the instant case, ComEd has petitioned the Commission to change its methodology for determining the market value for electric power and energy from the current neutral fact finder process to a market traded index based process. Petition at para. 1. The market value of electric power and energy is used to calculate the Power Purchase Option (“PPO”) price and Customer Transition Charge (“CTC”). Indeed, ComEd is attempting to change both the rates and charges under its Retail Customer Delivery Service - Nonresidential tariff as well as the practices used to determine those rates and charges. Therefore, this docket is subject to the requirements of Section 9-201.

The schedule set out in ComEd’s petition, filed March 31, 2000, requests that the Commission issue an Order by April 27, 2000 and for the tariff changes to become effective on May 1, 2000. Yet ComEd’s petition does not specifically ask that the 45-day filing requirement contained in Section 9-201 be waived. Instead it seeks an expedited schedule on the grounds that “May 1 is the first date of the June 2000 billing cycle...” and that the applicability of its Rider PPO-Power Purchase Option (Market Index) tariff begins with the June billing cycle. Petition at para. 6. Additionally, ComEd notes that “[a]dequate notice was given to interested participants...” concerning informal workshops over the past eight weeks at which issues related to the petition were discussed, and that copies of the petition were served to parties prior to filing. Petition at para. 7.

None of these facts constitute the “good cause” needed to justify waiving the 45-day filing requirement, such as emergency circumstances that would prevent the provision of electric

service barring the immediate implementation of tariffs. Instead, the Commission is instructed that it should expedite these proceedings to implement the tariffs by May 1st because the company's tariffs are premised on the granting of such a request. Nor is the fact that certain interested parties are on notice regarding the existence of ComEd's proposal through informal workshop discussions sufficient justification for disposing of the usual requirements of Section 9-201.

Pursuant to its authority under Section 9-201 of the Act, this Commission should hold formal hearings regarding the justness and reasonableness of ComEd's proposal. Since the Commission has not issued an order waiving the 45-day notice requirement, pursuant to Section 9-201, the 45-day notice period remains in effect. The Commission should therefore consider the appropriateness of the tariffs through traditional hearing procedures, as set forth in Section 9-201(b).

- B. The Hearing Examiner's proposed schedule petition does not meet the requirements of the Illinois Administrative Procedure Act, the Public Utilities Act or procedural due process.

Under the Illinois Administrative Procedure Act ("IAPA"), all parties in a contested case must be afforded an opportunity for a hearing, to respond and to present evidence and argument. 5 ILCS 100/10-25. In addition, the Commission has stated that the opportunity for discovery, use of expert witnesses, unrestricted cross-examination, and initial and reply briefs protects the due process rights of the parties before it. See Commonwealth Edison Company, Ill. C. C. Dkt. 87-0043, (July 16, 1987), 84 PUR 4th 469, 494 (citing the procedures of the Public Utilities Act and the constitutional mandates of due process and fair hearing).

The Illinois Appellate Court in People ex rel. The Illinois Commerce Commission v. Operator Communications, Inc., d/b/a/ Oncor Communications, Inc., 281 Ill. App. 3d 297, 666

N.E. 2d 830 (1996), stated that the Commission “is required by statute to provide an evidentiary hearing if there exists a dispute concerning a material fact in a contested case.” Oncor, 666 N.E.2d at 833. There is no doubt that a dispute exists concerning material facts regarding this petition, as is evidenced by the responses of several parties to the substance of Edison’s proposal. See e.g., “IIEC Objection to Proposed Schedule” at para. 10 and “Reply of Enron Energy Services, Inc. to the Responses to the Procedural Schedule Proposed by Commonwealth Edison Company,” at para 3. “Administrative proceedings must conform to the requirements of due process of law,” Oncor, 666 N.E.2d at 834, citing Distaola v. Department of Registration and Education, 72 Ill. App. 3d 977, 982, 391 N.E.2d 489, 29 Ill. Dec. 226 (1979).

In Balmoral Racing Club, Inc. v. The Illinois Racing Board, 151 Ill. 2d 367, 603 N.E.2d 489, 177 Ill. Dec. 419 (1992), the Illinois Supreme Court enumerated the minimal guarantees of procedural due process to include reasonable notice, the right to examine witnesses, to present witnesses, and to receive a fair and impartial hearing. 603 N.E.2d at 506. Further, the Illinois Appellate Court has consistently held that due process requires the right to present evidence, to argue on one’s own behalf, to cross-examine adverse witnesses and to challenge evidence. Piotrowski v. State Police Merit Board, 85 Ill. App. 3d 373, 406 N.E.2d 863 (1980) citing Lakeland Construction Co. v. Department of Revenue, 62 Ill. App. 3d 1036, 1040, 379 N.E.2d 859 (1978); Flick v. Gately, 328 Ill. App. 81, 65 N.E.2d 137 (procedural protections of the PUA require that a forum be available to properly test evidence). None of these due process elements are being afforded to the parties of this case.

The Hearing Examiner’s schedule does not provide parties with the opportunity to pursue discovery, to conduct cross-examination, to file initial or reply briefs or to conduct a hearing. This truncated schedule violates the procedural requirements of the PUA, the APA and the

fundamental constitutional requirements of due process and fair hearing. While some of these elements may be waived by unanimous approval of all parties, the Staff and the Hearing Examiner (see Section C below), no such unanimous waiver has been obtained in this docket.

C. A “paper hearing” has not been approved by all parties, as required by Section 200.525 of the Commission’s Rules of Practice.

The Commission Rules of Practice provide for a “paper hearing,” in which material issues are resolved on the basis of written pleadings and submissions verified by affidavit. See 83 Ill.Adm.Code 200.525(a). However, such a “paper hearing” requires a stipulation to the waiver of any rights that parties have to a hearing. See Id. This stipulation must be approved by all parties, the Staff and the Hearing Examiner. See 83 Ill.Adm.Code 200.525(b).

Instead of setting a hearing date, the Hearing Examiner’s Scheduling Ruling provides for responsive comments which may include expert opinions or evidentiary assertions, provided that they are supported by affidavit. As such, the Ruling creates a “paper hearing” as described above. See ICC Rules of Practice section 200.525(a). However there is no stipulation to waive any rights to a hearing that has been approved by all the parties, the Staff and the Hearing Examiner in this docket. Absent this fully approved stipulation, the “paper hearing” set out in the Scheduling Ruling is a violation of Section 200.525(a) of the Commission’s Rules.

The Commission’s Rules of Practice also allow for the waiver of a party’s rights to cross-examination, but again this waiver is only valid upon the approval of all parties, the Staff and the Hearing Examiner. 83 Ill.Adm.Code 200.615. The instant schedule does not provide for any cross-examination, and no party has waived its rights to cross-examination. Therefore, the schedule violates Commission Rule Section 200.615.

D. The questions attached to the Hearing Examiner’s Scheduling Ruling and the issues raised in ComEd’s petition indicate that the Commission needs to hold a hearing.

Attached to the Hearing Examiner's Scheduling Ruling were a series of detailed questions posed by Chairman Mathias (ostensibly, but not explicitly, directed to ComEd) on a variety of issues related to ComEd's petition. The very fact that the Chairman felt compelled to pose these questions indicates that the Commission does not yet have, nor will this truncated schedule provide them with, the necessary information by which to evaluate ComEd's proposal. Indeed, these questions indicate gaps in ComEd's proposal and the Commission's knowledge in such fundamental areas as: why ComEd is proposing substantial tariff changes when it recently claimed that there is "robust development of retail competition in the ComEd service territory"; how this truncated proceeding benefits customers; how the transition charge should be changed; why ComEd recommends that its changes be effective indefinitely, rather than as a temporary experiment; and, how the approval of this tariff will effect similar actions by other electric utilities in Illinois. The implementation of a competitive market for electricity is clearly too complicated to address without an appropriate hearing and the due process such a hearing entails.

The schedule adopted by the Hearing Examiner is inappropriate to the nature of this docket and also counter to the Commission's precedent in similar proceedings. The Commission conducted a full investigation and analysis of ComEd's previous 16-112(a) filing in Docket No. 99-0171. ComEd filed their petition for approval on March 23, 1999. Evidentiary hearings were held on July 8 and 9, 1999. The hearing included the pre-filed direct, rebuttal, and response testimony of ten witnesses who were subject to cross-examination. The Commission filed its order on August 24, 1999. In that order, the Commission found that the CINergy market index was not similar enough to ComEd's service area to generate a proper market value, and stated that while an exchange traded or other market traded index may develop into a reliable indicator of market value, at that time the Commission could not base its determination on such future

possibilities. Order, Commonwealth Edison Company, Docket No. 99-0171 (August 24, 1999).


Given the fact that the Commission is once again attempting to issue findings on the critical components of a newly-defined market for electric power and energy for Illinois consumers, and given the type of investigation which the Commission devoted to the consideration of market-based alternative tariffs once before, its decision to forego any hearing, cross-examination or briefing is contrary to its own procedures and to fundamental principles of due process,. To proceed as is now scheduled, cannot do justice to this important issue.

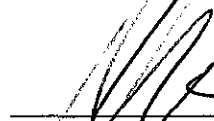
III. CONCLUSION

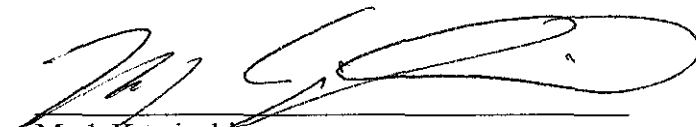
The Attorney General reiterates that while it supports the Commission's continued steps toward a viable, fully competitive electric power and energy market, the present schedule will not enable the Commission to give ComEd's petition the scrutiny that such a fundamental element of the nascent electricity competitive market requires.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
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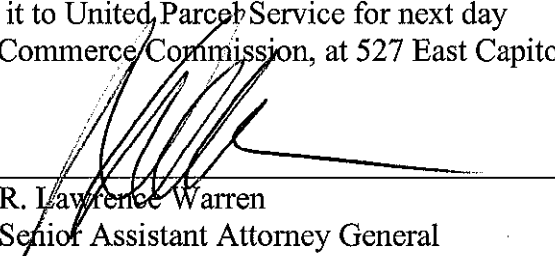
Dated: April 18, 2000

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company)	
)	00-0259
Petition for expedited approval of)	
implementation of a market-based)	
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or before May 1, 2000, pursuant to Article)	
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NOTICE OF FILING

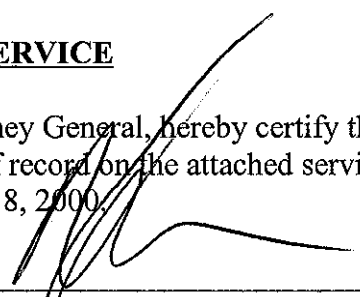
PLEASE TAKE NOTICE that on this date, April 18, 2000, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed Comments of The People State of Illinois' in the above-captioned docket by delivering it to United Parcel Service for next day delivery to Donna Caton, Chief Clerk of the Illinois Commerce Commission, at 527 East Capitol Avenue, Springfield, Illinois 62794.



R. Lawrence Warren
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I, R. Lawrence Warren, a Senior Assistant Attorney General, hereby certify that I served the above identified documents upon all active parties of record on the attached service list by United States Mail, first class postage prepaid on April 18, 2000.



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